SUPREME COURT, U.S.
FILED
NOV 4 1994
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No. 94-659

In The

Supreme Court of the United States

October Term, 1994

D.G.,

Petitioner,

v.

T.M.N., ADOPTIVE PARENTS AND CATHOLIC SOCIAL SERVICES,

Respondents.

On Petition For Writ Of Certiorari To The Kansas Supreme Court

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Does Kan. Stat. Ann. § 59-2136(h)(4), (5) (Supp. 1993) violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution, by giving a putative father of an illegitimate child notice and a hearing on the issue of termination of his parental rights upon criteria the State of Kansas has established to protect the child and the state's administrative and judicial branches.

TABLE OF CONTENTS

Page

Question Presented for Review i

Table of Contents..... ii

Table of Authorities iii

Statement of the Case 1

Reasons for Denying the Writ of Certiorari 4

Summary of Argument 4

Argument 6

Conclusion 15

TABLE OF AUTHORITIES

Pages

CASES

In re Adoption of Baby Boy L., 643 P.2d 168 (Kan. 1982) 7, 8

In re Baby Boy N., 19 Kan. App. 2d 574, ___ P.2d ___ (1994) 7

Caban v. Mohammed, 441 U.S. 380 (1979) .. 7, 8, 9, 11, 14

Dandridge v. Williams, 397 U.S. 471 (1970) 7

Labine v. Vincent, 401 U.S. 532 (1971) 6

In re Lathrop, 575 P.2d 894 (Kan. Ct. App. 1978) 7

Lehr v. Robertson, 463 U.S. 248 (1983) 12

Prince v. Massachusetts, 321 U.S. 158 (1944) 6

Quilloin v. Walcott, 434 U.S. 246 (1978) 10

Stanley v. Illinois, 405 U.S. 645 (1972) 6, 9, 10

Swayne v. L.D.S. Social Services, 761 P.2d 932 (Utah Ct. App. 1988) 14

STATUTES

Kan. Stat. Ann. § 59-2136(h)(4), (5) (Supp. 1993) .... *passim*

Kan. Stat. Ann. § 59-2102(2) 7

Kansas Adoption and Relinquishment Act, Kan. Stat. Ann. §§ 59-2111-2143 (Supp. 1993) 6

CONSTITUTION

Fourteenth Amendment to the United States Constitution 5, 15

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BRIEF IN OPPOSITION

The Respondents, T.M.N., Adoptive Parents and Catholic Social Services, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Kansas Court's opinion in this case.

STATEMENT OF THE CASE

Statement Of Facts

From the time that the mother of Baby Boy N. learned that she was pregnant, she expressed her desire that the child be placed for adoption. The father opposed the idea of adoption and indicated that he was willing to

take custody of the child. The mother was concerned that the father, an admitted alcoholic and prior drug user, would be unable to cope with the stress of child rearing and would resume drinking.

Although the father offered to marry the mother, he did not pursue the relationship. Rather, he abruptly terminated the couple's relationship, telling the mother that he did not want to see her any more. The mother wanted and needed the father's emotional support, and wanted to include him in the decisions she was struggling with regarding adoption and the choice of a couple. Entries in a diary which the mother kept prove that she needed and desired the father's presence and support. (A. 1-5)

The mother wrote a letter to the father in which she attempted to explain her feelings. She threatened to disappear if the father would not consent to the baby's adoption. However, the letter did not say the mother would not see the father, or would refuse his support, or run away if support were offered. Rather, the mother agreed to meet with the father to discuss the contents of the letter. They met on one occasion and planned a second meeting. During the meeting, the father refused the mother's request to go jointly to counseling to resolve their conflict. The father then failed to appear for the second meeting to discuss the letters and their respective positions, and did not phone to offer any explanation for his absence. The couple had no contact from June 3, 1992 until after the birth of the child.

The father phoned Wichita Legal Service, Inc. seeking advice about legal action he could take to prevent the adoption of the child. He did not speak to an attorney,

but was told by a clerk that there was no legal action which he could take until after the birth of the child. The clerk did not advise the father not to support the mother or to abandon her. The inquiry and response did not provide reasonable cause for the father's failure to support and abandonment of the mother.

From April 20, 1992, until the birth of Baby Boy N. on November 7, 1992, the mother and father had only incidental contact. The mother did not know where the father was living or working, and did not have his unlisted telephone number. The father did not provide any financial support for the mother. He opened a checking account in the mother's name, to protect deposits from *his* creditors. He never offered money in the account to the mother for her needs. He deposited no funds into the account during the six months prior to the child's birth. All money which the father withdrew from the account was used for his own benefit. The father did not offer to, nor did he pay for medical care for mother or child, or any expenses of the baby's birth. Moreover, the father presented no evidence that he had saved money to provide for the child after its birth.

The mother, believing that adoption was in the best interest of the child, did not disclose the identity or whereabouts of the father. The order, thus obtained, terminating the father's parental rights, was voluntarily set aside to afford him notice and a hearing. The trial court entered a final judgment on March 26, 1993, finding that the father had failed, without reasonable cause, to provide support to the mother during the six months preceding delivery of the child, and that he abandoned the

mother after having knowledge of the pregnancy. Custody of the child has been with the adoptive couple since approximately November 12, 1992. The final hearing to grant a decree of adoption in conformity with the opinion of the Kansas Supreme Court, was held on October 20, 1994.

REASONS FOR DENYING THE WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

A state has a legitimate interest in protecting the welfare of its children and families. Included in this state interest is the protection of illegitimate children, including facilitating adoption of such children to give them "legitimacy." Accordingly, courts only question whether the means used by a state to protect its children and families is constitutionally permissible. However, the Constitution does not give courts the right to substitute their judgment for that of the state as to what constitutes the best social policy for the state.

The constitutionality of Kan. Stat. Ann. § 59-2136(h) (Supp. 1993), which allows for termination of a father's parental rights based upon a finding that the parent has failed to perform statutorily imposed duties, has been upheld by the Kansas Court of Appeals, and the father's petition for review was denied by the Kansas Supreme Court. Under the facts presented, the father of Baby Boy N. was not deprived of his right to due process. The father was given notice and an opportunity to be heard prior to termination of his parental rights, upon a finding

that he had failed, without reasonable cause, to provide support for the mother for six months before the birth of the child, and had abandoned her after having knowledge of the pregnancy.

A review of opinions of the United States Supreme Court in which it analyzed state adoption statutes allowing for the adoption of a child over the objections of a father, without a finding of the father's unfitness, support the conclusion that Kan. Stat. Ann. § 59-2136(h) (Supp. 1993), as applied to the father of Baby Boy N., is constitutional. Where a father has not come forward to establish a familial relationship with a child and its mother, a finding of unfitness is not required for termination of his parental rights. Where the relationship between father and child is purely biological, standards may be applied that test, indirectly, the best interests of the child and fulfill the state's interests, so long as the father is given notice and a hearing.

The father of Baby Boy N. did not come forward to establish a familial relationship with the mother of his child. He did not perform the duties which are enumerated in Kan. Stat. Ann. § 59-2136(h) (Supp. 1993). Under that statute, a father's parental rights may be terminated upon a finding that he is *either* unfit, *or* he has failed to perform the duties imposed by statute or abandoned the mother. The statute does not deprive the father of his right to due process as guaranteed by the Fourteenth Amendment of the United States Constitution.

ARGUMENT

The Kansas Legislature enacted the Kansas Adoption and Relinquishment Act, Kan. Stat. Ann. § 59-2111-2143 (Supp. 1993), establishing procedures for adoption and for terminating parental rights where a parent does not meet requirements which are imposed by law. Courts have long recognized that it is within the power of the states to take all reasonable steps to secure the well-being of its children, and the stability of the family unit.

Indeed, the United States Supreme Court has stated that no right, including freedom of religion, is entitled to paramount consideration over the state's reasonable attempts to secure the welfare of its children. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

The Court observed in *Stanley v. Illinois*, 405 U.S. 645 (1972), that the stated purposes of the Illinois Juvenile Court Act were "legitimate interests well within the power of the state to implement." *Id.* at 652. The stated aims of the Act were to "protect the moral, emotional, mental, and physical welfare of the minor and the best interests of the community" and to "strengthen the minor's family ties whenever possible . . . " *Id.*

The Kansas Legislature has created a statutory duty of the natural father to support and not abandon the natural mother prior to the delivery to preserve his rights to defeat an adoption. If the father cannot fulfill this duty, the state questions his ability to fulfill his parental duties for the next 18 years, to the detriment of the child and with potential burden to the state and judicial system.

Both the United States Supreme Court and the Kansas Court of Appeals have specifically acknowledged that there is a legitimate and important state interest in providing for the well-being of illegitimate children, including placing the children in a stable, nurturing family atmosphere. *Caban v. Mohammed*, 441 U.S. 380, 391 (1979); *In re Lathrop*, 575 P.2d 894, 899 (Kan. Ct. App. 1978) (state has legitimate interest in facilitating the adoption of children born out of wedlock). Accordingly, courts question only whether the means used by the states to achieve such legitimate ends are constitutionally defensible. However, "[t]he Federal Constitution does not give [courts] the power to overturn the state's choice under the guise of constitutional interpretation because the justices . . . believe they can provide better rules." *Labine v. Vincent*, 401 U.S. 532, 537 (1971); *Dandridge v. Williams*, 397 U.S. 471, 486 (1970) (Fourteenth Amendment does not give federal courts the power to impose their view of what constitutes states' wise social policy).

The Kansas Court of Appeals determined that Kan. Stat. Ann. § 59-2136(h)(4), (5) (Supp. 1993), as applied to terminate the parental rights of the natural father of Baby Boy N., does not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *In re Baby Boy N.*, 19 Kan. App. 2d 574, ___ P.2d ___ (1994).

The Kansas Supreme Court previously held that a statute which allowed for the adoption of an illegitimate child without the consent of the child's father passed constitutional muster. In *In re Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982), the court considered the constitutionality of Kan. Stat. Ann. § 59-2102(2), the predecessor

to Kan. Stat. Ann. § 59-2136, which required the consent of a mother, but not of a father, to the adoption of an illegitimate child. The court held that the statute did not violate an unwed father's rights to equal protection and due process when he is given notice and participates in a hearing to determine if he is either unfit, or has failed to perform statutorily imposed duties. Similarly, Kan. Stat. Ann. § 59-2136(h)(4), (5) (Supp. 1993) is not unconstitutional as applied to the father of Baby Boy N. The father was afforded notice and a hearing to determine if his parental rights should be terminated because he is either unfit, or failed to perform duties enumerated in the statute. The Kansas Court of Appeals held that "the Constitution does not prohibit dispensing with a father's consent when the factual situations shown in Kan. Stat. Ann. § 59-2136(h) (1)-(7) are shown to exist and the father's due process rights to litigate those issues has [sic] also been protected." 19 Kan. App. 2d at 584.

In *Baby Boy L.*, the Kansas Supreme Court agreed and concurred with excerpts from the dissenting opinions of Mr. Justice Stewart and Mr. Justice Stevens in *Caban v. Mohammed*, 441 U.S. 380 (1979). Mr. Justice Stewart stated:

> The Constitution does not require that an unmarried father's substantive parental rights must always be coextensive with those afforded to the fathers of legitimate children. . . . [T]he putative father should not be able arbitrarily to withhold the benefit of legitimacy from his children. . . . Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring. . . . But here we are concerned with the rights the unwed father may have

> when his wishes and those of the mother are in conflict, and the child's best interests are served by a resolution in favor of the mother. It seems to me that the absence of a legal tie with the mother may in such circumstances appropriately place a limit on whatever substantive constitutional claims might otherwise exist by virtue of the father's actual relationship with the children. . . . With respect to a large group of adoptions – those of newborn children and infants – unwed mothers and unwed fathers are simply not similarly situated. . . . This custodial preference has carried with it a correlative power in the mother to place her child for adoption or not to do so.

643 P.2d at 217-18 (quoting 441 U.S. at 397-400). The Kansas Supreme Court emphasized that the majority decision in *Caban* might have been different where an infant was involved as opposed to older children.

The Court of Appeals, in this case, carefully reviewed decisions of the United States Supreme Court which have dealt with the constitutionality of rules applied in adoption proceedings, which are statutory in origin. The court correctly noted that "the degree of protection afforded parental rights under the Due Process Clause depends upon the extent and nature of the parent-child relationship." 19 Kan. App. 2d at 584-85.

In *Stanley v. Illinois*, the Court reviewed Illinois statutes which allowed children to be declared dependents upon their mother's death, without providing for a hearing in which an unmarried father could have the opportunity to show that he was deserving to have custody of his children. Under the facts presented in *Stanley*, the

Court held that the unwed father was entitled to a hearing to overcome the presumption of unfitness based solely on his child's illegitimacy. 405 U.S. at 656-57.

Neither the facts presented in *Stanley*, nor the statute under consideration therein are similar to the present case. There, the father had established a long term familial relationship with the children and their mother. Additionally, the Illinois statute did not afford Stanley a hearing in which the court could make an individualized determination of whether he had fulfilled his duties and should be allowed to assert his parental rights.

Unlike the facts of *Stanley*, the father of Baby Boy N. did not establish or preserve a relationship with the child's mother. Moreover, the father was not deprived of his parental rights based solely on a presumption of unfitness due to the child's illegitimacy, but was given a hearing in which his parental rights were terminated upon a showing, by clear and convincing evidence, that he had failed to fulfill the obligations imposed by Kan. Stat. Ann. § 59-2136(h)(4), (5) (Supp. 1993).

In *Quilloin v. Walcott*, 434 U.S. 246 (1978), the Court upheld the constitutionality of a Georgia statute which provided that only the mother's consent is required for the adoption of an illegitimate child. The statute had been applied to deny an unwed father veto rights over the adoption of his child. The father, who had not taken the necessary steps to legitimize the child prior to the filing of the adoption petition, raised the same argument asserted by the father herein – that his due process rights were violated because the trial court did not make a finding that he was unfit. The Court held, however, that

the father's constitutional rights were not infringed by application of a "best interest of the child" standard, a standard much more likely to lead to termination of parental rights than the Kansas statutory scheme. Additionally, the Court held that it was constitutionally permissible to treat an unwed father who had not "shouldered any significant responsibility" differently from a married, separated or divorced father. *Id.* at 256.

Baby Boy N.'s father did not shoulder any significant responsibility for the support of the mother during the six month period which, under Kansas law, is critical to a determination of his willingness and ability to accept responsibility for the care of his unborn child. It defies logic that a father who has not provided financial or emotional support to the mother of his child, who has not made any effort to contribute financially to the medical expenses of the child's birth, and has neither saved money nor provided a home in which to care for the child, should be given the chance to veto the adoption so that he can be given another chance to show whether he would provide emotional and physical support to the child.

The third in a series of cases in which the United States Supreme Court considered the constitutionality of a state's adoption statute was *Caban v. Mohammed*, 441 U.S. 380 (1979). The Court ruled that the statute – which required the consent of a mother for the adoption of an illegitimate child, but not the consent of the father – as applied to the facts of the case, was a violation of the natural father's right to equal protection. Caban, the natural father, had lived with the mother and had established a familial relationship with the two children born

to the couple. Caban supported the children and remained close to them even after he and the mother separated. The Court indicated that a different result might have been reached in a situation in which an illegitimate infant was involved, or in which the father had no established relationship with the mother and child. *Id.* at 392. The court observed that a mere biological connection, without more is not entitled to constitutional protection. *Id.*

Here, the father has done nothing to establish more than a biological relationship. He has not demonstrated his willingness to enter into a long term familial relationship with the mother in anticipation of the birth of the child, rather he terminated their relationship. The father did not talk to the mother, did not inquire of her needs and would not agree to go to counseling, which the mother requested, in an attempt to work out the disagreements which had arisen between the couple. He simply walked away for his own selfish reasons. The father, who was given notice and a hearing before his parental rights were terminated, was not deprived of constitutional protection.

Finally, the United States Supreme Court in *Lehr v. Robertson*, 463 U.S. 248 (1983), determined that the notice provision of a New York statute did not violate an unwed father's constitutional rights. The Court held that the statute which allowed the father's parental rights to be terminated without notice or hearing adequately protected his due process rights. *Id.* at 265.

The New York statutory scheme required notice of adoption proceedings to be given to only seven classes of

natural fathers, including fathers who placed their names in the state's putative father's registry, and fathers who had assumed parental responsibility. *Id.* at 263-64. The father in *Lehr*, had not registered as a putative father and had neither provided support for nor had a significant relationship with the child. The court held that, under the statute, responsible fathers would receive notice, and the ability to be entitled to notice of an adoption proceeding was within control of the natural fathers. *Id.* at 264. Moreover, the court observed that the putative father's ignorance of the law – the necessity of either registering or developing a relationship with the child – did not provide a basis for criticizing the statute. *Id.*

The father of Baby Boy N. argues that the Kansas statutory scheme has prevented him from establishing a significant relationship with his child, cutting off his opportunity, prior to the child's birth, to accept responsibility for the child's future. He further argues that he offered to marry the mother, but she not only refused to marry him, but sabotaged his efforts to establish a relationship with his child.

The trial court found, however, that there was clear and convincing evidence that the father abandoned the mother, walking away when she wanted and needed his emotional support. He did not continue a relationship with the mother in an effort to see if his support and presence might have convinced her to retain custody of the child or reconsider his previous offer of marriage. Thus, by his own actions, the father destroyed his opportunities to establish a familial relationship with his child and its mother, which would entitle him to veto rights

over the adoption of the child, absent a finding of unfitness.

In enacting Kan. Stat. Ann. § 59-2136(h)(4), (5) (Supp. 1993), Kansas has established as a policy of the state, that fathers who fail, without reasonable cause, to provide support, or who abandon mothers prior to childbirth, have failed to create familial relationships which deserve to be preserved regardless of findings on the issue of unfitness. The rationale of the statute is to test whether the relationship the natural father has created biologically has been preserved or developed. As Mr. Justice Stewart wrote in *Caban*, "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." 441 U.S. at 397 (Stewart, J., dissenting).

State courts have relied on the rationale that states have the power to establish prerequisites to the assertion or preservation of rights of an illegitimate father. For example, the court in *Swayne v. L.D.S. Social Services*, 761 P.2d 932 (Utah Ct. App. 1988), held that a state statute which gives an unwed father the right to consent to adoption only if he has signed an acknowledgement of paternity does not deprive the father of due process rights. The court wrote: "[b]ecause of [the father's] unwed status, he does not have parental rights subject to termination until he asserts them by either filing an acknowledgement of paternity pursuant to section 78-30-4 or by establishing a substantial relationship with the child." *Id.* at 940. Accordingly, the court upheld the constitutionality of the state's statutory scheme which allows a father's parental rights to be terminated without notice or hearing.

Thus, the father's argument that Kan. Stat. Ann. § 59-2136 (h)(4), (5) (Supp. 1993) are unconstitutional, by reason of the court's failure to find that the natural father was unfit, must fail. Under Kansas law, when a court provides a natural parent with a hearing and *either* finds the parent to be unfit *or* finds that the parent did not perform any of the acts enumerated in the statute, the court may sever the individual's parental rights. A statute which provides for termination under such circumstances comports with the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

CONCLUSION

The Kansas Court of Appeals and the Kansas Supreme Court have determined that Kan. Stat. Ann. § 59-2136(h)(4), (5) (Supp. 1993) do not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The decision does not conflict with previous decisions of the United States Supreme Court. Accordingly, we respectfully request the Court to deny the Petition for Writ of Certiorari filed herein.

Respectfully submitted,

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APPENDIX

AUGUST 11
TUESDAY

224/142

Nathan was awful this morning. Throwing a fit and Tam babying him. She makes me so mad. Took the boys to school then had to go back to get mom. Her and dad were working on some paper work.

We had another busy day. Ate out here for lunch. Had soup & salad. Was pretty good.

When we got home, I made dinner. Norma called. She asked me about Dave. I about died. She never asks about him. You know even w/ Ferlin around I still care about him. He hasn't called in ages. Oh well he must not care to much cuz he knows I wouldn't leave anyway. Well Ferlin is always there for me he takes his place. Norma thinks I'm crazy for dating Ferlin. So do I. But she usually doesn't like me dating anyone.

Mom lost her glasses tonight. Been looking all over for them. We are looking too hard. We'll just have to look in the morning. Boy its getting late. I'm tired.

SEPTEMBER 22
TUESDAY

266/100 Aunt Tillie B-Day

Syd 9 am – Looked at books today. She only had 2. Carol 34 & Tom 35 seamed [sic] a lot like our family. Carol has been divorced but her & Tom have been married 14 yrs. She has a girl 18 a boy – 20. They seam [sic] to have a lot of fun like our family. And they are happy. The only thing is they didn't say much about religion. The other couple really stressed religion. They are 30 & 32. I really like them, the only thing is they were happy but they didn't seem like our family. I don't know. I really liked how they felt about letting the birthmom see the child. I don't think the other couple does. I wish I wasn't so afraid to talk to Dave. I want him in on this but he would never go for anything. He wants to keep the child. I feel so rotten. I am taking something so precious away from him. Goodness I have to think. I have to think about this. I hate to think about it. The second couple – he works for his family – an accountant – she is a teacher. Tom is an engineer.

Had litt'l boy 8:48 pm 7lbs 3 oz. 20 in.
Lots of black hair big feet
Dinner w/ Ferlin 530 – cx1
Alan Jackson Concert 730 – cx1

NOVEMBER 7
SATURDAY

224/142 Aunt Nadie B-Day

Cuz they were getting closer. When I got home I called Ferlin. I had a feeling when I woke up I was going to have this baby but I didn't tell anyone. I told Ferlin I wasn't feeling well and I wasn't too sure about tonight. I couldn't hardly handle the backache or pain. I could but some of them hurt so bad. Mom called Dr. A told him my situation & he said I was having gas. Mom wasn't to happy. This was at 5. Norma & Stacey came over about the time I started getting ready to leave. Mom said we was going to go to the hospital & find out if this was gas pains or not. Screw Dr. A. Norma came over to get her jeans. I couldn't hardly get them to leave. Tam finally came out & said I had a phone call. They left then mom & I headed to St. Joe. Told Tam to call Ferlin & tell him. Got to St. Joe about 6 pm. We went to the emergency room. Mom told the nurse – we came in to get rid of my gas pains. She laughed & said to tell my Dr. it was a 6lb 4oz big FART. Finally got checked in and the nurse came down w/ a wheel chair. I made mom get in when we got to the room another nurse came in and when I sat down on the bed, she looked @ me so funny – she thought mom was the patient. We laughed. Then they put all those

monitors on me. My back was killing me. The heartbeat on the baby was between 148-160. They finally came in and gave me an epideral [sic]. The nurse that took me up was so nice, I forgot her name. Then a Cheryl came in. She wasn't as personable as the first nurse. Then I had to tell them if I wanted the care of the baby done in the room. I decided to have it in my room. Ferlin came up. I wanted him there but then again I didn't want him there. So I let him in. The intern came in, he was cute. Dr. Hoeft. Before I got an epideral [sic] he checked me. Said I was 7 to 8 bulging. He was shocked. They ended up breaking my water. Found out I have scoliouses [sic]. So much for the Alan Jackson Concert. Even w/ the epideral it hurt – Ferlin was there counting for me. I just wanted to get it all over with. Well at 848 he finally came out after Doc kept telling me to hang on and not to push. Doc messed around for about another hour delivering the placenta and sewing me up. Dr. A made it in time for the sewing up. They cleaned litt'l boy up & checked him out. Grandma got to hold him first, then Ferlin – much later I held him. I got to take a bath – when the nurse Cheryl was getting me up my legs gave out – they were still asleep. Soaked a long time – had a whirlpool bath. Ferlin looked terrible. I thought I was doing pretty good. Oh the little guy is so cute. He's 7lbs 3-4oz, 20 in long. He has big feet like his M & D. He has Dave's hand, nose & eyes & Long little legs. He is so sweet. I wanted mom to stay w/ me but Ferlin wouldn't leave. So mom stayed till 1 AM. I didn't 313/53 want her to go. Ferlin held litt'l boy all SUNDAY, NOVEMBER 8 night. I didn't get to hold him much. He went some where & I got to hold him. He was sleeping & I was so tired so we layed together & slept for

about 20 min. Ferlin came back in & I woke up. I just wanted to sleep. But we stayed up till 430 or 5. When I fell asleep it didn't last long. Woke up @ 10. Ferlin finally went home to change & do some homework. Which I know he wouldn't do. The nurse came in and got lit'l bit. I tried to get some rest. Everytime I fell asleep someone would wake me up. About 2 mom & dad came up. They stayed till bout 4. They didn't have lunch. Ferlin came back up; we took pictures of lit'l bit. Rachel got a birth-card for me. I was suppose to get a birth certificate & his feet prints. But didn't get them. We left about 6. I didn't want to leave him there. We went to Bonanza for dinner. Didn't eat much. Couldn't, neither one of us. Went home. Tim & Chanel were over. Told them. Told Tam – just have to tell Todd & Ted. I wish it was Dave w/ me instead of Ferlin. But Ferlin has been the one always there for me.